Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	
Review of the Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	CC Docket No. 98-147

US INTERNET INDUSTRY ASSOCIATION
PETITION FOR CLARIFICATION AND PARTIAL RECONSIDERATION

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Summary and Introduction

The US Internet Industry Association ("USIIA"), the leading national trade association of companies engaged in Internet commerce, content, and connectivity; seeks on behalf of its members and the industry it serves seeks partial reconsideration and/or clarification of the Commission's Triennial Review Order ("*TRO*").[1]

USIIA is a national trade association of competitive companies engaged in Internet commerce, content and connectivity. Its members constitute a cross-section of the Internet industry, providing consensus on policy issues that breach the competitive interests of any single member or segment of the industry.

USIIA members, through their annual dues and membership status, entrust the Association to represent their interests before regulatory and legislative bodies at the international, national and local levels. The Association's positions on issues represent a consensus of the opinions of its members, expressed through the USIIA Public Policy Committee, membership in which is open to all members in good standing; and through its Board of Directors, elected from among the membership. As the appointed representative of its members charged with advancing their economic interests and assisting in achieving and maintaining their legal and competitive parity, USIIA has standing to file these comments.

USIIA has no financial interest in the outcome of the proceedings. The comments presented are based on a consensus of the best interests of the Internet industry and its members, and are not subject to change or withdrawal due to any contracts, agreements, competitive pressures, market valuations or corporate strategies.

USIIA thus urges the Commission to make the following modifications or clarifications to the *TRO*: (1) confirm that broadband services not requiring unbundling under section 251 do not need to be unbundled under section 271; (2) eliminate the ambiguities that would pose barriers to deployment of fiber to multiunit premises; (3) clarify that mass market fiber-to-the-premises includes customer locations with up to 48 numbers; and (4) clarify that network upgrades and installation of broadband capability would not constitute a disruption or degradation of TDM capability. The modifications suggested herein will remove those roadblocks and thus well serve the public interest and Congress' directive in section 706 to facilitate the availability of advanced telecommunications capabilities to all Americans.

Many of these points will be addressed in separate filings by other parties and need not be addressed in detail in this petition. However, the first of these points does need further specification.

1. For All the Reasons the Commission Did Not Require Unbundling Broadband Under Section 251, the Commission Should Confirm That It Did Not Require It Under Section 271, Either.

The Commission analyzed broadband services in detail and concluded that section 251 did not require that they be unbundled. When the Commission announced its decision in February, it stated flatly that unbundling would not be required — for example,

> "There are no unbundling requirements for the packet-switching features, functions, and capabilities of incumbent LEC loops."

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[1] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* FCC 03-36, rel. August 21, 2003.

> "There is no unbundling requirement for new build/greenfield FTTH loops for both broadband and narrowband services. There is no unbundling requirement for overbuild/brownfield FTTH loops for broadband services."[2]

Individual commissioners echoed these statements, whether they supported the Commission's decision or not:

> "I strongly support the Commission's decision to exempt new broadband investment from unbundling obligations."[3]

> "The action we take today provides sweeping regulatory relief for broadband and new investments. It removes unbundling requirements on all newly deployed fiber to the home."[4]

> "That means that as incumbents deploy fiber anywhere in their loop plant — a step carriers have been taking in any event over the past years to reduce operating expenses — they are relieved of the unbundling obligations that Congress imposed to ensure adequate competition in the local market."[5]

> "For example, the portion of the item that does not require unbundling of fiber to the home loops for brand new builds may make a lot of sense."[6]

The commissioners repeated these statements when they answered questions from Congress about their decision:

> "The Order freed incumbent LECs from unbundling requirements on next-generation facilities and equipment like FTTH and equipment used to provide packet switching services."[7]

> "The Commission's *Order* relieves incumbent local exchange carriers ('ILECs') from unbundling requirements on next-generation facilities and

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[2] News Release, "FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers," at 4 (Feb. 20, 2003).

[3] Press statement of Commissioner Abernathy at 1.

[4] Press statement of Commissioner Martin at 1.

[5] Press statement of Commissioner Copps at 2.

[6] Separate statement of Commissioner Adelstein at 3.

[7] Response of Commissioner Martin to Questions from Rep. Eshoo at 1.

> equipment like fiber-to-the-home ('FTTH') and equipment used to provide packet-based services."[8]
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> "I believe that providing relief from unbundling obligations for broadband facilities was the right decision."[9]

There was no suggestion that only section 251 unbundling would be eliminated and that new unbundling obligations would be created under section 271.

The *TRO* and the regulations it adopted carried out these statements. The Commission's Executive Summary states, without qualification,

> "Incumbent LECs do not have to offer unbundled access to newly deployed or 'greenfield' fiber loops or to the packet-switching features, functions, and capabilities of their hybrid loops."
>
> "Incumbent LECs are not required to unbundle packet switching, including routers and Digital Subscriber Line Access Multiplexers (DSLAMs), as a stand-alone network element. The Order eliminates the current limited requirement for unbundling of packet switching."[10]

Nowhere in the scores of pages the Commission devoted to these issues did it even hint that the obligations that it refused to impose on ILECs generally under section 251 would be imposed on some ILECs under a different provision of the statute.

When the Commission did discuss the section 271 unbundling requirements, it did so in a very general way. Nowhere in that discussion does the Commission mention broadband or state that the section 271 unbundling obligations extend to broadband services.

All the policy reasons that led to the sound conclusion that broadband need not be unbundled under section 251, of course, also lead to the conclusion that broadband

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[8] Response of Chairman Powell to Questions for the Record at 9.

[9] Response of Chairman Powell to Post-Hearing Questions for the Record at 12.

[10] *TRO* ¶ 7.

services not be unbundled under section 271 either. The Commission's order, however, does not clearly state that broadband need not be unbundled under that section as well. The Commission should forestall any confusion as to this point and confirm that this is the case.

The Commission has long recognized that broadband services are in a market separate from that for narrowband services,[11] and that rules that might be appropriate for one are not necessarily appropriate for the other.[12] Moreover, in enacting section 706 of the Telecommunications Act of 1996, Congress recognized that broadband services were different and instructed the Commission to use de-regulatory tools to encourage their deployment.[13]

The Commission applied the unbundling requirements of sections 251(c)(3) and 251(d)(2) incorporating the approach required by section 706. "In crafting our unbundling requirements, we consider other factors, most notably our mandate under section 706 of the Act to promote the rapid deployment of advanced services throughout the nation."[14] Indeed, the Commission found that "the courts require" that it "consider

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[11] *E.g., AOL-Time Warner Merger Order*, 16 FCC Rcd 6547, ¶ 69 (2001).

[12] *E.g., Internet Over Cable Declaratory Ruling*, 17 FCC Rcd 4798, ¶¶ 4-7 (2002).

[13] "The Commission … shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans … by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56.

[14] *TRO* ¶ 198.

whether unbundling will deter investment or whether unbundling is consistent with the goals of section 706."[15]

That analysis caused the Commission to conclude generally that "applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706."[16] As a result, "we craft unbundling rules that provide the right incentives for all carriers, including incumbent LECs, to invest in broadband facilities."[17]

In particular, for example, the *TRO* recognizes that fiber-to-the-premises loops "meet the definition of advanced telecommunications capability" under section 706 and finds that "promoting the deployment of [fiber-to-the-premises] loops is particularly important in light of our section 706 mandate." Based on its analysis of the marketplace, the Commission then concludes that "removing incumbent LEC unbundling obligations on [fiber-to-the-premises] loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market."[18]

Similarly, the Commission applied the section 706 requirements in its analysis of unbundling of hybrid loops. In that connection, it found that limiting the unbundling obligation "promotes our section 706 goals" by "giv[ing] incumbent LECs an incentive to deploy fiber" and by "stimulat[ing] competitive LEC deployment of next-generation

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15 *TRO* n.556.

16 *TRO* ¶ 288.

17 *TRO* ¶ 213.

18 *TRO* ¶ 278.

networks."[19] This would fulfill the section 706 mandate that "the Commission [] encourage deployment of advanced telecommunications capability by using, among other things, 'methods that remove barriers to infrastructure investment.'"[20]

Likewise, as to packet switching, the Commission found that "requiring no unbundling best serves our statutorily-required goal" under section 706. This would "ensure that both incumbent LECs and competitive LECs retain sufficient incentives to invest in and deploy broadband infrastructure, such as packet switches."[21]

If it is correct, as the Commission found, that "applying section 251(c) unbundling obligations to these next-generation network elements would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities, in direct opposition to the express statutory goals authorized in section 706,"[22] then it must also be equally true that applying *section 271* unbundling obligations to those same next-generation networks would have exactly the same consequences. If unbundling broadband under section 251 is inconsistent with section 706, unbundling under section 271 is equally inconsistent. Moreover, section 271 was intended to address Congress' concern that the BOCs not be able to obtain any unfair advantage in the long distance market because of their legacy "bottleneck" networks,[23] a factor that is irrelevant to the broadband facilities at issue here.

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19 *TRO* ¶ 290.

20 *TRO* ¶ 290.

21 *TRO* ¶ 541.

22 *TRO* ¶ 288.

23 *TRO* ¶ 655.

Requiring a BOC to unbundle broadband services under section 271 would eliminate all the benefits the Commission strived to achieve by eliminating the section 251 unbundling requirement. It would reduce the incentive of the BOCs to deploy broadband services because they would have to share those services with their competitors. It would require the BOCs to redesign the basic fiber loop architecture to provide access points for competitors to individual network elements. They would also have to design and deploy support systems and procedures to allow other carriers to use these unbundled facilities and to get access to them. All this would add to the BOCs' broadband costs, raising the cost of broadband to consumers and further slowing its deployment. It would also increase the BOCs' risk in making broadband investments. Requiring unbundling under section 271 would also have the perverse effect of skewing broadband deployment to non-BOC territories, where the ILEC is free of any unbundling obligations.

But the harm of requiring unbundling under section 271 goes beyond the BOCs and their customers. Manufactures would have to design and build two versions of their broadband equipment, a normal one for non-BOCs and an unbundleable version for the BOCs. This would increase the cost of everyone's equipment and slow its development and deployment.

It would be irrational for the Commission to find unbundling is required by the Act as it considers one section (271) and at the same time find that unbundling is inconsistent with Act as it considers a different section (251). This is especially true since the overarching goals of another Congressional directive (section 706) apply regardless of which unbundling provision is under review. The result of requiring

unbundling under section 271 would defeat the Commission's well-reasoned purpose of not requiring ILECs to unbundle broadband under section 251. The Commission should therefore, confirm, that as to broadband services a BOC's unbundling obligations under section 271 are the same as its obligations under section 251.

Conclusion

Reconsideration and clarification of these elements of the *TRO* are consistent with the tenet of regulatory parity endorsed by the USIIA and its members, and formalized as the policy of the association by its Board of Directors.

Clarification is likewise consistent with the tenet of minimal regulation of broadband as necessary for the investment in and rapid deployment of advanced Internet services, including but not limited to fiber-to-the-premises. This is likewise endorsed by the Association and its members and formalized as the policy of the association by its Board of Directors.

USIIA therefore requests that the Commission reconsider, clarify and change its rules as described in this petition.

Respectfully submitted,

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